SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 1249

CARLOS OVERTON,

Petitioner,

v.

RAYMOND C. RIEGER, Director of the Department of Probation of the County of Westchester,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Issue Presented

Was the appeal from an order of the United States District Court for the Southern District of New York dismissing a petition for a writ of habeas corpus, properly dismissed by the United States Court of Appeals for the Second Circuit upon jurisdictional grounds?

Statement of the Case

On June 8, 1965, the appellant was adjudicated a Youthful Offender and placed on indefinite probation. (Court of Special Sessions of the City of Mount Vernon, New York, Honorable John P. Griffith.) He then appealed that adjudication to the Appellate Term of the Supreme Court of the State of New York, which reversed (51 Misc. 2d 140 [1966], Appendix, p. 32). The People then appealed to the New York Court of Appeals, which reversed the Appellate

Term (20 N. Y. 2d 360 [1967], Appendix, p. 28). On remand, the Appellate Term affirmed without opinion. On petition for a writ of certiorari, this Court vacated that judgment and remanded for further consideration (393 U. S. 85 [1968], Appendix, p. 27). A petition for rehearing was denied (393 U. S. 992 [1968]), and on remand, the New York Court of Appeals upon reconsideration, adhered to its original decision (24 N. Y. 2d 522 [1969], Appendix, p. 22). No petition for a writ of certiorari was filed.

On September 12, 1969, the appellant filed a petition in the United States District Court for the Southern District of New York, for a writ of habeas corpus (69 Civ. 4006). The denial of that petition on April 6, 1970, by Honorable Irving Ben Cooper (311 F. S. 1035 [1970], Appendix, p. 16) was appealed to the United States Court of Appeals for the Second Circuit. Respondent's motion to dismiss was granted by order of the Court dated September 28, 1970 (Appendix, p. 14). The petitioner's application for rehearing was denied by order of the Court dated October 21, 1970 (Appendix, p. 15).

The instant petition should be denied as moot

The instant petition should be denied as moot as the petitioner was not in custody when the petition for a writ of habeas corpus was filed, and is not now in custody.[1] There was and is no detention, the legality of which could be considered on a writ of habeas corpus, and therefore, a writ cannot issue (28 U.S.C. 2241).

> "The federal habeas corpus statute requires that *the applicant must be 'in custody' when the application for habeas corpus is filed.* This is required not only by the repeated references in the statute, but also by the history of the great writ. Its province, shaped to guarantee the most fundamental of all rights, is to

[1] It is conceded that, for the purpose of petitioning for a writ of habeas corpus in the Federal Courts, a person who is actually on probation is in custody within the meaning of 28 U.S.C. 2241.

provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." (Emphasis supplied.)

Carafas v. *La Vallee*, 391 U. S. 234 (1968).

"It is well settled that this court will not proceed to adjudication where there is no subject matter on which the judgment of the court can operate. And although this application has not as yet reached that stage, still as it is obvious that before a return to the writ can be made, or any other action can be taken, the restraint of which petitioner complains would have terminated, we are constrained to decline to grant leave to file the petition."

Ex parte Baez, 177 U. S. 378 (1900).

The fact that a Court may grant relief other than discharge from custody following the issuance of a writ of habeas corpus, has led to the determination that provided the petitioner was in custody at the time the writ was sought, subsequent discharge pending appeal would not necessarily render the issue moot (*Carafas* v. *La Vallee*, *supra*). The issue may not, however, be moot at the time the relief is sought and then, because an appeal is taken, gain life. In the instant case the issue was moot when the petition was filed in the District Court as the petitioner was not then in custody, and is now moot as he is not now in custody.[2]

The *Carafas* Court then found that a petitioner who had petitioned for a writ of habeas corpus while he was in custody would be entitled to appellate review as he still had a "substantial stake in the judgment of conviction which

[2] The petitioner is not in custody as a result of adjudication upon which he sought a writ of habeas corpus. On September 2, 1970, the petitioner was certified as a narcotic addict under § 210 of the Mental Hygiene Law (by the County Court) as the result of totally unrelated charges and committed to the care and custody of the Narcotic Addiction Control Commission for a period of up to 36 months.

survives the satisfaction of the sentence imposed on him," in that the "disabilities or burdens (which) may flow from petitioner's conviction" continue for the rest of his life. The petitioner is suffering from no "disabilities or burdens" as a result of his adjudication and has not been "convicted."

> "No determination made under the provisions of this title shall operate as a disqualification of any youth subsequently to hold public office, public employment, or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no youth shall be denominated a criminal by reason of such determination, nor shall such determination be deemed a conviction." (Section 913n New York Code of Criminal Procedure)[4]

The instant petition should be denied as moot, as the petitioner was not in custody when the petition for a writ of habeas corpus was filed and is not now in custody and further because his adjudication did not result in a "conviction" nor is he suffering from any "disabilities or burdens."

The petitioner was not in custody when the petition for a writ of habeas corpus was filed on September 12, 1969.

On June 8, 1965, the petitioner was adjudicated a Youthful Offender and placed on indefinite probation. The maximum period of probation and hence custody was three years.

> "*The defendant may be placed on probation for a period not to exceed three years*, provided, however, that the Court in its discretion may from time to time, while such probation is in force, extend such probation for a period not to exceed five years, including the

[4] All references to the New York Law are to the law as it existed at the time of adjudication, unless otherwise noted.

original probationary period." (Emphasis supplied.) (Section 913m, New York Code of Criminal Procedure.)

The indefinite period of probation imposed, expired at the end of the three-year maximum and as it had not been extended prior to that time, could not thereafter be extended (913m, New York Code of Criminal Procedure). The period of probation commenced to run on June 8, 1965, and continued to May 20, 1966 when the adjudication was reversed by the Appellate Term. The period then commenced to run anew on July 7, 1967, when the Court of Appeals reversed the decision of the Appellate Term. This Court subsequently vacated the decision of the Appellate Term and remanded the matter for further consideration, but did not vacate the adjudication by the Mount Vernon Court. Hence, the period of probation continued to run from the reversal by the New York Court of Appeals until its maximum expiration on July 26, 1969.

The maximum period of probation having automatically expired at the end of three years, namely, on July 26, 1969, forty-eight days prior to the filing of the petition in the District Court on September 12, 1969, the petitioner was not in custody as required by 28 U.S.C. 2241, and hence the District Court lacked jurisdiction to issue a writ of habeas corpus.

The indefinite period of probation was further limited to the petitioner's twenty-first birthday, which was October 8, 1968.

> "*The period of probation may not in the case of a child extend beyond his minority.*" (Emphasis supplied.) Section 933, New York Code of Criminal Procedure.[4]

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[4] Repealed Laws of New York 1967, Chapter 681. Such repeal does not affect the petitioner as to do so would amount to an *ex post facto* law in violation of the Constitution of the United States.

It is obvious therefore, that, under the New York law, the period of probation imposed upon the adjudication of the petitioner as a Youthful Offender, and hence custody, expired at the expiration of three years or on his twenty-first birthday, whichever occurred first. As the petitioner's twenty-first birthday was on October 8, 1968, three hundred and thirty-nine days before the petition for a writ of habeas corpus was filed in the District Court, the petitioner was not in custody as required by 28 U.S.C. 2241, and a writ of habeas corpus could not issue.

Petitioner waived federal review

The petitioner urges that he should not be denied federal review because it took so long to exhaust his state remedies. That contention is utterly without merit, as the only right to federal review open to a defendant is by way of petition for a writ of certiorari after affirmance by the State Courts. Such was voluntarily waived by the petitioner who was fully aware of that avenue of pursuit.

On April 23, 1969, the decision of the New York Court of Appeals ended the appellate course of the original adjudication in the State Court. At that time the petitioner had ninety days[5] or until July 22, 1969 to petition the United States Supreme Court for a writ of certiorari (U. S. Sup. Ct. Rule 22, 28 U.S.C.). It cannot be alleged that the petitioner was not aware of this course of action as on June 19, 1968 a prior petition for a writ of certiorari was docketed in this Court (*Overton* v. *New York*, 393 U. S. 85 [1968]).

The petitioner chose not to seek review of his adjudication by this Court until September 12, 1969, fifty-two days after his time to do so expired. The appellant, in a belated attempt to obtain review by this Court, then attempted to do indirectly that which he could not do di-

[5] An application for an additional 60 days could have been made within that period (U. S. Sup. Ct. Rule 34, 28 U.S.C.).

rectly, and filed a petition for a writ of habeas corpus in the District Court, even though he was not in custody and that Court therefore lacked jurisdiction.

The District Court lacked jurisdiction to entertain the petition for a writ of habeas corpus and the appeal was therefore properly dismissed.

The petitioner was not in custody, as required by 28 U.S.C. 2241, when he filed the petition for a writ of habeas corpus in the District Court, and hence that Court lacked jurisdiction to consider the petition on the merits. The Circuit Court of Appeals was limited in the first instance to a review of the exercise of that jurisdiction by the District Court and properly determined that such was improperly invoked.

The petitioner indicates that such issue was not properly raised by the respondent, however, whether it was or not is immaterial as the Circuit Court of Appeals had the duty to notice the defect and dismiss.

> "The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the District Court should, therefore, have declined sua sponte, to proceed in the cause. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit. The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill."

United States v. *Corrick*, 298 U. S. 435 (1936).

> "Unlike an objection to venue lack of Federal jurisdiction cannot be waived or be overcome by an agree-

ment of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."

Mitchell v. *Maurer*, 293 U. S. 237 (1934).

"The threshold question is whether the District Court had jurisdiction of the matter at issue, if jurisdiction is lacking, the power of this Court is limited to correcting the error of the District Court in entertaining jurisdiction."

Transport Manufacturing and Equipment Company of Delaware v. *Trainor*, 382 F. 2d 739 (1967).

A writ of habeas corpus may not extend to a person unless he is in custody at the time of the filing of the petition (28 U. S. 2241, *Carafas* v. *La Vallee, supra*). In the instant case it is clear that the petitioner was not in custody at the time he filed the petition for a writ of habeas corpus in the District Court. As the District Court lacked jurisdiction to entertain the petition, the attempt to do so was properly corrected by the Circuit Court of Appeals when it dismissed the appeal.

CONCLUSION

The instant petition for a writ of certiorari should be denied.

Respectfully submitted,

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